To the Court of Criminal Appeals:

The State writes in its *Reply Brief*,

> Protected speech can plainly be restricted, even based on content. If that were not so, strict scrutiny would not exist and every First Amendment case would end once it is determined whether the speech at issue is categorically unprotected.

The State misses three things.

First, and not incidental to the label, "protected speech" is just that: protected. Unprotected speech may be freely regulated; protected speech may be regulated based on its content only when the regulations satisfy strict scrutiny. This Court, in *Ex parte Thompson*, held that intermediate scrutiny is appropriate only in the case of a content-neutral time, place, and manner restriction. *Ex parte Thompson*, 442 S.W.3d 325, 345 (Tex. Crim. App. 2014). The State should not claim that protected speech may be protected from content-based restriction by anything less than strict scrutiny.

Second, aside from the anomalous *Williams-Yulee*,[1] discussed in Mr. Jones's brief at 44, every First Amendment case in the Supreme Court in this century that, like this one, has dealt with content-based

[1] *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656 (2015).

penal restrictions has ended once it was determined that the statute restricted a real and substantial amount of protected speech.

Third, strict scrutiny may be applied to hold unconstitutional a statute that restricts some, but not a real and substantial amount of constitutionally protected speech. As the only speech at issue here is protected speech, this Court need not consider the quantum of protected speech restricted.

"Line of Best Fit"

When the United States Supreme Court says, "the law is thus," or demonstrates by its actions that the law is thus, it is neither necessary nor appropriate to apply statistical mumbo-jumbo to the law. The United States Supreme Court applied strict scrutiny to invalidate the statutes in *Reed* and in *Alvarez*, and "public concern" was not a consideration. The United States Supreme Court applied strict scrutiny to invalidate the statutes in *Stevens* and in *Brown*, while noting that even valueless speech is fully protected. Even for speech that we may consider valueless, the "line of best fit" is that which the Supreme Court has drawn: content-based restrictions must satisfy strict scrutiny.

Stevens applied strict scrutiny.

The State in its reply brief makes the argument that Justice Alito made in concurrence in *Brown*[2]: that in *Stevens* the Court had not applied strict scrutiny. The Court in *Brown* rejected that argument. Please see footnote 88 of Mr. Jones's brief.

Value is not a measure of speech's protection.

The State at page 3 claims that "speech protection depends on its value," and then at page 4 disclaims a "'value-of-speech argument' that the speech at issue is unprotected." In *Stevens* the government argued:

> Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.

United States v. Stevens, 559 U.S. 460, 470 (2010). The State's argument here—that *how much* First Amendment protection a category of speech enjoys depends on the societal value of the speech—finds no support in the law, and should be rejected as soundly as the United States Supreme Court rejected the Government's argument in *Stevens*:

> As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First

[2] *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2010).

> Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure." *Marbury v. Madison*, 1 Cranch 137, 178, 2 L.Ed. 60 (1803).

United States v. Stevens, 559 U.S. 460, 470 (2010).

> To be fair to the Government, its view did not emerge from a vacuum. As the Government correctly notes, this Court has often described historically unprotected categories of speech as being "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Id. Speech in the recognized categories of historically unprotected speech may be described as having less societal value—"deserving" less scrutiny—than other speech. But it is not unprotected *because* it has less social value:

> [S]uch descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor.

Id. at 471. Speech that is unprotected is not unprotected because of its low value; it is unprotected because it has been unprotected since 1791.

Index of Authorities

This brief cites the following cases:

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A copy of this brief, which contains 836 words, has been delivered to counsel for the State by the efiling system.

Thank you,

Mark Bennett
SBN 00792970
Bennett & Bennett
917 Franklin Street, Fourth Floor
Houston, Texas 77002
713.224.1747
mb@ivi3.com